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IN THE

Supreme Court of the United States

October Term, 1980

BIAGIO PINTO a/k/a BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether in a multi-count federal criminal prosecution, where each count states a separate and independent offense, the court of appeals, after reversing defendant's conviction and sentence of five years imprisonment on one count and affirming defendant's conviction and sentence of five years probation on the second count, may *sua sponte* remand the second and surviving count so that the prosecution may apply to the district court for resentencing on that second count in light of the reversal of the conviction and sentence on the first count:

(a) Whether, in these circumstances, a court of appeals has authority to invite reopening of a final sentence within the limits permitted by law.

(b) Whether, in these circumstances, a court of appeals invitation to reopen a final and legal sentence, by prosecution motion in the district court, violates the Double Jeopardy Clause of the Fifth Amendment.

II. Whether the proscription of false statements or reports in connection with loan or credit applications, found in 18 U. S. C. § 1014, applies to the situation where a bank erroneously transmits funds entirely as a result of its own unilateral mistake:

(a) Whether an "advance" within the meaning of § 1014 arises other than from a consensual transaction in which the parties have created an expectation of reimbursement.

(b) Whether there is any evidence to sustain the charge in this indictment that an "advance" had been made to petitioner.

Parties to the Proceeding

The only parties to this proceeding are those named in the caption of the case.

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OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, A1-A12) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, A13-A14) was entered on April 16, 1981. A timely petition for rehearing *in banc* was denied by an order entered on May 8, 1981 (App. C, *infra*, A15-A16). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *.

2. Section 1014 of Title 18 of the United States Code is as follows:

> **§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance**
>
> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal inter-

mediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

3. Federal Rule of Criminal Procedure 35 is as follows:

Rule 35. Correction or Reduction of Sentence

(a) Correction of Sentence.—The court may correct an illegal sentence at any time and may correct a

sentence imposed in an illegal manner within the time provide herein for the reduction of sentence.

(b) **Reduction of Sentence.**—The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT

This federal criminal prosecution[1] rests on a three-count indictment (10A-14A).[2] One count charged petitioner with bank larceny. 18 U. S. C. § 2113(b). A second count alleged that petitioner had made false statements to influence a bank upon an "advance." 18 U. S. C. § 1014. The third count contained a charge of wire fraud. 18 U. S. C. § 1343. The jury found petitioner not guilty of the wire fraud charge (8A). The court of appeals held that the facts did not show bank larceny and ordered the conviction on that count set aside.[3] The questions presented in this petition concern the validity of the conviction on the surviving count, which charges false statements in connection with an "advance," and the sentence on that count. Petitioner contends that the uncontested facts do not constitute an offense under § 1014. Petitioner also contends that the court of appeals erred in remanding the case to the trial court with an explicit invitation to the prosecution to apply for resentencing for this offense.

The essential facts of the case are simple and clear. On June 6, 1974, the Philadelphia National Bank (PNB) received a telex communication from a correspondent bank in Japan, Sanwa Bank, Ltd., which instructed PNB, according to its *mistaken* reading of the telex, to transmit $193,511.00 from Sanwa Bank's account in PNB to the Pinto Trucking Service (56A-57A). A PNB employee determined that the balance in the Sanwa Bank account was sufficient to make this transmittal; she immediately

1. Jurisdiction of the district court is based on 18 U. S. C. § 3231.

2. Citations with the suffix "A" refer to the Appendix prepared and filed by petitioner in the court of appeals below.

3. A petition for rehearing on count 1, with a suggestion for rehearing en banc, was filed by the government on May 29, 1981, and denied on June 10, 1981. (App. D, *infra* pp. A17-A18).

put a "hold" in that amount on the account so that PNB could take out the money to pay Pinto (58A). Having discovered that Pinto Trucking Service was not a customer of PNB (59A), she telephoned the Trucking Service for instructions on how the firm wished to handle the payment (59A-60A). The office manager and comptroller, who received the call, told her to send the transmittal to the First Pennsylvania Bank, for deposit to the firm's regular bank account there (60A-61A, 186A). PNB complied, and First Pennsylvania promptly credited the checking account of Pinto Trucking Service with a deposit of $193,511.00 (61A).

Petitioner was the president and chief executive officer of the Pinto Trucking Service, Inc. As such, he was in control of the day-to-day operations of the corporation. However, he had no part in the events leading to the action of PNB transmitting funds to the corporation's account in the First Pennsylvania Bank.

By the end of July 1974, the Pinto Trucking Service bank account at the First Pennsylvania Bank had been exhausted. Between June 6 and July 31, numerous checks were drawn on the account to pay creditors of the corporation (200A, 287A-297A, 391A-392A).[4] Both the comptroller and the outside auditor characterized the firm then as insolvent, unable to meet its current obligations (261A, 387A-390A). The corporation's total assets were greater than its total liabilities (389A-390A), but it was lacking liquid assets to meet short-run obligations. In the comptroller's words, the available funds "were paid to the creditors who were pressing the hardest . . ." (297A).

Meanwhile, there were discussions within the Trucking Service and with its ouside auditor on the proper

4. Some of the corporation's disbursements during this period went to petitioner, the chief executive officer of the Pinto Trucking Service. The comptroller described this as the amounts that petitioner would normally draw in a month (289A-290A).

accounting of the $193,511.00 deposit. The independent auditor had been informed almost immediately that this sum had been deposited to the corporate bank account (355A-356A), and the firm's comptroller could not account for any source of this payment (187A-188A). The auditor was concurrently preparing his regular quarterly statement of the corporation's financial status as of June 30, 1974. Completing the audit statement, the auditor determined that the sum should be reported on the corporation's books as a cash receipt matched by a liability in the same amount to PNB (365A-366A). Petitioner accepted the auditor's position and the corporate books so indicated (366A).

In mid-August, petitioner and the auditor began planning how to repay the sum. The corporation's cash position was still bad (166A-171A, 390A). Petitioner directed the auditor to contact the First Pennsylvania Bank, the firm's principal lender, to see if that bank would lend the Trucking Service funds to repay the obligation to PNB (412A-413A).

These events all preceded any awareness by PNB of a mistake in its transmittal of funds on June 6. It was not until September 23 that PNB obtained the first intimation from Sanwa Bank of some error (76A-77A).[5] A representative of PNB then examined the June telex and realized that the intended instruction, while ambiguous, had probably been to transfer $193.51. The PNB representative telephoned the Pinto Trucking Service and spoke with Murray S. Laskey, who had recently replaced the former office manager and comptroller (80A-81A).

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5. Sanwa Bank had sent PNB a request for information regarding the June 6 debit to its account on July 31, but this request did not suggest any irregularity (74A-75A). Even the September 23 communication was couched as a request for further information, but it led PNB to reexamine the June 6 transaction for the first time.

Laskey checked the company's books, found recorded the deposit of $193,511.00, and reported to PNB that the money had been received by the firm in June (81A, 334A-335A).

Thereafter Laskey met with petitioner who told him that the larger sum had been rightfully received by the Trucking Service; petitioner showed Laskey a set of invoices which were in the aggregate for that approximate sum (336A-337A). During the next several days, the independent auditor and the corporation's attorney separately advised PNB that the Trucking Service had open invoices that explained the receipt of the funds from Japan (82A-83A, 107A-108A, 370A-371A). PNB obtained confirmation from Sanwa Bank that the transfer was meant to be only $193.51 (84A-88A). PNB called the corporation's attorney who reiterated that his clients still felt they were entitled to the money (88A).

Petitioner's efforts to prove at trial that, after substantial negotiation, the $193,511.00 was repaid were frustrated by the prosecution's objection to the evidence as irrelevant (97A-98A, 113A). A detailed and specific offer of proof was rejected by the district court (29A-33A, 394A-398A).

The jury acquitted on the wire fraud charge, but returned verdicts of guilty on the counts alleging bank larceny (Count 1) and making false statements to influence a bank upon an "advance" (Count 2) (8A).

The district court imposed a five-year prison term for the bank larceny (551A). On the false statements count, the sentence was:

> "In respect to Count 2, the imposition of sentence is suspended and you are placed on probation for a period of five years from this date" (551A).

As pronounced in open court, the probation sentence was not made consecutive to the prison term, but commenced to run immediately.[6]

The Court of Appeals for the Third Circuit (Gibbons and Van Dusen, Circuit Judges; Ackerman, District Judge) held that the dissipation of funds credited to the Trucking Service's bank account wholly because of another bank's unilateral error is not bank larceny punishable under 18 U.S.C. § 2113(b). The court of appeals reversed petitioner's conviction on that count.

The court of appeals affirmed petitioner's conviction on Count 2. The court ruled that PNB's transmittal of funds on June 6 was an "advance" within the meaning of the statute:

> "The mistaken deposit into defendant's account constitutes an 'advance' under the terms of 18 U.S.C. § 1014." (Appendix A, p. A11, *infra*).

The court concluded further that a jury might have found that statements made to PNB in late September and early October by the corporation's attorney were made with intent to influence PNB upon that "advance."

No issue had been raised by either petitioner or the Government to the sentences imposed by the district court on either count. Both sentences were within the permissible limits set by the respective statutes. However, the court of appeals, acting on its own motion, reached the following conclusion:

> "[Petitioner's] conviction on Count 2 will be affirmed and the case will be remanded as to the sentence on Count 2 so that the prosecution may apply to the dis-

6. A different order appears in the Docket Entries, where the probation sentence is fixed to run from the expiration of the prison sentence. This change in sentence is ineffective. *Hill v. Wampler*, 298 U. S. 460 (1936).

trict court for resentencing on that count, in light of the reversal of the conviction and sentence on Count 1. *See United States v. Busic*, — F.2d — (Nos. 77-1375, 77-1736, 3d Cir. Jan. 20, 1981)." (Appendix A, p. A12, *infra*).

A timely petition for rehearing *in banc*, filed by petitioner, was denied by the court of appeals on May 8, 1981.

REASONS FOR ALLOWANCE OF THE WRIT

I. Whether in a multi-count federal criminal prosecution, where each count states a separate and independent offense, the court of appeals, after reversing defendant's conviction and sentence of five years imprisonment on one count and affirming defendant's conviction and sentence of five years probation on the second count, may *sua sponte* remand the second and surviving count so that the prosecution may apply to the district court for resentencing on that second count in light of the reversal of the conviction and sentence on the first count:

(a) Whether, in these circumstances, a court of appeals has authority to invite reopening of a final sentence within the limits permitted by law.

(b) Whether, in these circumstances, a court of appeals invitation to reopen a final and legal sentence, by prosecution motion in the district court, violates the Double Jeopardy Clause of the Fifth Amendment.

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1. The Decision of the Court Below Is in Conflict With Decisions of Every Other Federal Court of Appeals on the Same Matter.

The decision by the Third Circuit in this case upsets a thoroughly litigated and well-settled pattern of cases that includes the considered judgments of every court of appeals in the country. This is not the first instance in which the suggestion has arisen that, in a multi-count prosecution, reversal on appeal of the conviction on one count might lead to an increased sentence on a surviving count. Repeatedly and consistently, courts of appeals have rejected this suggestion.

The citations to only the most recent decisions of the circuit courts is sufficient to demonstrate the solidity of

the courts' judgments. *United States v. Frady*, 607 F. 2d 383 (D. C. Cir. 1979); *Borum v. United States*, 409 F. 2d 433 (D. C. Cir. 1967), cert. denied, 395 U. S. 916 (1969); *United States v. Bynoe*, 562 F. 2d 126 (1st Cir. 1977); *United States v. Sacco*, 367 F. 2d 368 (2d Cir. 1966); *Whaley v. North Carolina*, 379 F. 2d 221 (4th Cir. 1967); *Chandler v. United States*, 468 F. 2d 834 (5th Cir. 1972); *United States v. Adams*, 362 F. 2d 210 (6th Cir. 1966); *United States v. Turner*, 518 F. 2d 14 (7th Cir. 1975); *United States v. Durbin*, 542 F. 2d 486 (8th Cir. 1976); *United States v. Edick*, 603 F. 2d 772 (9th Cir. 1979); *United States v. Best*, 571 F. 2d 484 (9th Cir. 1978); *Kennedy v. United States*, 330 F. 2d 26 (9th Cir. 1964); *Owensby v. United States*, 385 F. 2d 58 (10th Cir. 1967).

Prior to 1981, the Court of Appeals for the Third Circuit also maintained this position. *United States v. Fredenburgh*, 602 F. 2d 1143 (3d Cir. 1979); *United States v. Benedetto*, 558 F. 2d 171 (3d Cir. 1977); *Government of the Virgin Islands v. Henry*, 533 F. 2d 876 (3d Cir. 1976); *United States v. Corson*, 449 F. 2d 544 (3d Cir. 1971) (in banc); *United States v. Welty*, 426 F. 2d 615 (3d Cir. 1970).

The Third Circuit has now consciously overruled its own prior decisions and knowingly taken a stand that conflicts with the holdings of the other ten circuits. A panel decision first did so in *United States v. Busic*, 639 F. 2d 940 (3d Cir. 1981). No review of that decision was sought in this Court.

The *Busic* panel decision followed a decision by this Court, which held that the enhancement of sentence provision in 18 U. S. C. § 924(c)(1) could not be employed for an offense that contained within itself a provision for augmented punishment when a dangerous weapon had been used. 18 U. S. C. § 111. *Busic v. United States*, 446

U. S. 398 (1980). On remand to the Third Circuit, a panel held:

> "There is nothing in the history or the policies of the Double Jeopardy Clause that justifies denial of resentencing where the sentence has been spread erroneously over counts that have been declared invalid." (639 F. 2d at 947-948).

The court concluded that its own prior decisions had been based upon a misunderstanding of the reach of the Double Jeopardy Clause.

In arriving at this result, the court relied substantially upon this Court's decision in *United States v. DiFrancesco*, — U. S. —, 101 Sup. Ct. 426 (1980).[7] In *DiFrancesco*, this Court upheld a narrowly drawn federal statute authorizing prosecution appeal from sentence under a provision of the Organized Crime Control Act. This Court concluded that that statute's grant of limited appellate review of sentence, specifically focused on a particular problem, and circumscribed by procedural safeguards, did not offend the Double Jeopardy Clause. The statute involved in *DiFrancesco*, 18 U. S. C. § 3576, has no general application and, of course, does not authorize prosecution appeal from sentence in this case.

Although *DiFrancesco* involves consideration of the double jeopardy constraints that apply to prosecution appeals from sentence, it does not control the quite different set of issues raised in this context. This Court's opinion in *DiFrancesco* does not refer to the long line of decisions by the lower courts on resentencing after some counts of multi-count convictions have been reversed. Certainly, this Court has not overruled those cases.

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7. The panel also relied upon *DiFrancesco* to permit it to overrule a line of prior cases without convening the Third Circuit *in banc* as is required by that court's Internal Operating Procedures. 639 F. 2d at 953 n. 14.

A primary question in the multi-count cases, a question perhaps more fundamental than the constitutional limits of the Double Jeopardy Clause, is whether there is authority for a federal court to consider making any change in a final sentence. The authority for appellate review of sentence, the issue in *DiFrancesco,* was conferred by statute. Federal trial courts have sharply limited authority to modify sentence under FED. R. CRIM. P. 35, which of course contains no power to increase a legal sentence. The *Busic* panel never explained the source of the court of appeals' power to vacate the sentences. Unlike the order in *Busic,* the court below did not vacate petitioner's sentence. Rather the court invited the district court to do so. The cryptic opinion does not hint by what authority the lower court might do so.[8]

Beyond the question of authority to entertain proceedings to change final, legal sentences, there are undoubtedly constraints imposed by the Double Jeopardy Clause. All of the courts of appeals, including the Third Circuit prior to 1981, held that a change in sentence on a surviving count because other counts had been reversed on appeal would be violative of the Fifth Amendment. The Third Circuit now creates a conflict on this vital question. Given the frequency of litigation of this issue, it is a conflict that is likely to spread.

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8. The severe limits on the authority of federal courts to modify final sentences may be influenced by the presence of constitutional constraints as well as by other factors relevant to the administration of justice. Certainly, there is no reason to believe that the limits on the power of the courts to entertain post-sentence proceedings were designed to make available all authority permissible under the Constitution. The recent addition of limited appellate review of sentence in § 3576, which this Court upheld as constitutional in *DiFrancesco,* sufficiently illustrates the point. Compare the statutory provision for prosecution appeal from other decisions, 18 U. S. C. § 3731; 4 ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 21-1.4 (2d ed. 1980).

Extended argument on the merits of the constitutional issues is not appropriate in a petition for writ of certiorari, but it is important to note that the Third Circuit's change of position does not demonstrate that the well-settled view of the other circuits has been wrong. In its only opinion on the subject, the panel opinion in the *Busic* case, the Third Circuit dealt with the particular problem of the sentence for a single offense having been divided over two counts, because the sentencing judge erroneously assumed that the enhancement provisions of § 924(c) were available to increase the sentence for the basic offense under § 111. As the court of appeals indicated, "the sentence has been spread erroneously over counts that have been declared invalid." 639 F. 2d at 947-948.[9]

In the present case, petitioner was convicted of two separate and independent offenses. They were permissively joined in an indictment, but petitioner could have been convicted of both and sentenced consecutively to the maximum penalties authorized for each offense. The sentencing judge could have imposed a prison term for the violation of § 1014, the only surviving count, with that term concurrent to the prison term imposed for the bank larceny. Where there are separate and independent offenses, it must be presumed that the sentencing court has chosen the sen-

9. The Solicitor General similarly stressed that the issue in *Busic* was a divided sentence for a single offense. When the case was before this Court, the Solicitor General argued that, if the enhancement provision of § 924(c) were unavailable, the case should be remanded for resentencing: ". . . we submit that where an unlawful act results in a multi-count prosecution under more than one federal statute, the Double Jeopardy Clause does not bar a defendant from being re-sentenced on the outstanding counts if his conviction or sentence is overturned on his appeal . . . ." Brief for the United States, p. 69. This Court did not reach the question. *Busic v. United States*, 446 U. S. at 412 n. 19.

tence appropriate to each offense. Whatever the strength of the inference in a case like *Busic* where there are two sentences for a single offense, that inference does not and cannot apply to a situation like that presented in this case.

The Third Circuit has carved out a position that completely and frontally conflicts with the settled position of all of the other circuits. This Court should grant a writ of certiorari to resolve this conflict.

2. The Court of Appeals Has Decided This Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Allowance of the writ of certiorari is warranted not only because of the conflict of decisions among the courts of appeals, but also because the questions presented are fundamental matters of federal law that ought to be settled by this Court. While every court of appeals has addressed the issues posed here, this Court has not yet done so. With the circuits now in conflict, it is especially urgent for this Court to act promptly.

This Court has been developing a modern exegesis of the Double Jeopardy Clause in a substantial number of recent cases. Two of the most recent have involved aspects of the sentencing process. *Bullington v. Missouri*, — U. S. —, 49 U. S. Law Week 4481 (May 4, 1981); *United States v. DiFrancesco*, — U. S. —, 101 Sup. Ct. 426 (1980). Justice Powell's dissenting opinion in *Bullington* observes that: "This is the first time the Court has held that the Double Jeopardy Clause applies equally to sentencing and to determinations of guilt or innocence." 49 U. S. Law Week at 4486.

The issues presented by this case are exceedingly important to the parties in criminal cases. Moreover, proper sentencing disposition in multi-count prosecutions

is of the highest importance to the administration of justice in the district courts. Flexible sentencing patterns, now available, allow for concurrent and consecutive sentences in multi-count convictions and are adequate to the situation when sentences are imposed. There ought not to be any residual sentencing problem that emerges on appeal from convictions in these cases.

This Court has emphasized that a purpose of the Double Jeopardy Clause is to protect defendants from anxiety and insecurity that will occur if their expectations of finality are undermined. In *DiFrancesco*, the Court concluded that the statute in question, authorizing prosecution appeal from sentence, had put the defendant on notice of possible appellate review of sentence.

> "Under § 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired." (— U. S. at —, 101 Sup. Ct. at 437).

In the present case, petitioner had no warning that the court of appeals might decide, on its own motion and without statutory or other authority, to invite the prosecution to ever seek resentencing in the district court. Nor does the court of appeals action limit the scope or timing of any resentencing proceeding.

Defendants are entitled to know, *before* appeals are taken, what their sentences are and what the effect will be on sentence if any count of a multi-count conviction is reversed. Reopening of final and legal sentences after appeals creates the very anxiety and insecurity that the Double Jeopardy Clause is meant to preclude. Even the prospect that a court of appeals might do so has an inevitable effect upon the integrity of the criminal process.

Uncertainty on this vital matter chills the right of defendants to appeal from convictions.

The Solicitor General sought to persuade this Court to address the narrower resentencing issue raised in *Busic v. United States*, 446 U. S. 398 (1980). The Solicitor General argued that the lower federal courts, which then uniformly precluded resentencing in multi-count convictions, had rested their decisions on insufficient grounds. Brief for the United States, pp. 57-70. This Court declined the urging of the Solicitor General in *Busic* because the Third Circuit had not yet addressed the matter:

> "The Court of Appeals has not considered this contention in this context and we are reluctant to do so without the benefit of that court's views. Accordingly, we express no opinion as to whether in the particular circumstances of this case such a disposition would be permissible." (446 U. S. at 412 n. 19).

The Third Circuit has now spoken, first in *Busic*, and thereafter in the decision below. The Government has achieved a breakthrough in the Third Circuit. It is timely for this Court to consider these fundamental matters before there are scores of cases in which resentencing proceedings have been undertaken after appeals.

Petitioner submits that the importance of this question and its likelihood of recurring in a large number of cases are sufficient reasons to warrant this Court's grant of certiorari in this case.

II. Whether the proscription of false statements or reports in connection with loan or credit applications, found in 18 U. S. C. § 1014, applies to the situation where a bank erroneously transmits funds entirely as a result of its own unilateral mistake.

(a) Whether an "advance" within the meaning of § 1014 arises other than from a consensual transaction in which the parties have created an expectation of reimbursement.

(b) Whether there is any evidence to sustain the charge in this indictment that an "advance" had been made to petitioner.

The court of appeals has decided an important question of federal law which has not been, but ought to be settled by this Court.

The court below held that the action of PNB on June 6, 1974, when it transmitted funds to the First Pennsylvania Bank pursuant to an order of a PNB depositor, constituted an "advance" under 18 U. S. C. § 1014. Stripped of the immaterial facts that the depositor was a Japanese bank and the order was a telex communication, this transaction was no different from the clearing of millions of checks and other payment documents every business day. PNB, solely as a result of its own unilateral mistake, failed to execute its depositor's order correctly. The result was transfer of an erroneously large amount from its customer's account. This is only one of a great many ways in which banks may fail to carry out the payment instructions of their depositors. The court below concluded that the recipient of the payment, who did not influence or participate in the bank's mistake, received an "advance" under § 1014. Because, months later, the recipient's attorney stated orally that his client claimed he

was entitled to the funds, the Third Circuit declared that the ingredients of a federal crime were complete.

The effect of the Third Circuit's interpretation of § 1014 is a truly staggering expansion of the scope of federal criminal jurisdiction. In the millions of bank transmittals that occur each business day, a substantial number of mistaken payments are inevitable. Any one coupled with a false statement, no matter how informal, no matter how far removed from the facts of the transmittal, gives rise to a potential federal criminal prosecution. The issuance of a check for more than the balance in the depositor's account could also be a false statement which, coupled with payment of the check, brings the event within the range of federal prosecution.[10]

The court below offered no justification for its extraordinary widening of federal criminal jurisdiction. Certainly there is no support for the court's action in the text of the statute, in its title, or in its legislative history. The court acknowledged that there is no precedent for its conclusion.

It is apparent from the face of the statute (pp. 1-2 *supra*) that it is intended for transactions in which credit is obtained from federal agencies or from institutions insured by federal agencies. In context, there is no suggestion that this section covers payment transactions or transmittals of funds. The title of the section is: "Loan and credit applications generally; renewals and discounts; crop insurance." Section 1014 was created, in the 1948

10. Already moving through the lower federal courts are prosecutions under § 1014 for check-kiting schemes. *United States v. Payne*, 602 F. 2d 1215 (5th Cir. 1979); *United States v. Sher*, 505 F. Supp. 858 (W. D. Pa. 1981); *United States v. Edwards*, 455 F. Supp. 1354 (M. D. Pa. 1978). The Fifth Circuit upheld a conviction under § 1014 in *Payne*. The district courts in Pennsylvania disagreed. *Sher* is pending on appeal in the Third Circuit. No. 81-1317.

revision of the federal code, by amalgamating thirteen prior provisions into a single section. Ordinary commercial banks were not added until 1970. 84 STAT. 1017.

After the lengthy list of federal agencies extending credit or insuring lenders, the statute lists the included transactions:

> "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor."

The "1948 Revisers" Notes explain that this string of transaction-types resulted from aggregating terms used in the many prior separate statutes: "they represent a composite of terms and transactions mentioned in each." 18 U. S. C. A. § 1014 (Historical and Revision Notes).

The plain meaning of the statute is directed at *consensual* transactions creating and executing credit arrangements. Consensual credit agreements give rise to an expectation of repayment. Payment transactions, by contrast, involve only transmittals of funds without any expectation of reimbursement. As far as PNB was concerned, its transmittal of funds on June 6, 1974, was a "final payment" under § 4-213 of the Uniform Commercial Code. 12A PA. STAT. ANN. § 4-213 (Purdon's 1970). It was not until nearly three months later that PNB discovered it had paid by mistake. The law of restitution permits persons who have made payments by mistake to recover in quasi-contract in some circumstances to prevent unjust enrichment. This common-law remedy is manifestly not within the ambit of § 1014.

The term "advance" has a well understood, familiar meaning in the context of credit transactions created by

agreement. By extending that term to non-credit transactions involving transmittal of funds, the court below has distorted § 1014. The consequence for petitioner is an improper conviction on no evidence. *Jackson v. Virginia,* 443 U. S. 307 (1979). The consequence for the federal system will be the burdens which will follow from this severe expansion of the reach of federal law.

Petitioner respectfully submits that this is an important question of federal law that should be settled by this Court.

CONCLUSION

A writ of certiorari should be issued to review the decision of the court of appeals below.

Respectfully submitted.

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June 1981

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2420

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a Bob Pinto, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Criminal No. 79-00133)

Argued January 23, 1981

Before GIBBONS and VAN DUSEN, *Circuit Judges*,
and ACKERMAN,* *District Judge*

---

* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

(Opinion filed April 16, 1981)

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Attorneys for Appellee

OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

Defendant, Biagio Pinto, was charged in a three-count indictment with violating 18 U. S. C. § 2113(b), 18 U. S. C. § 1014, and 18 U. S. C. § 1343, respectively. The district court jury returned a verdict of guilty on Counts 1 and 2 and not guilty on Count 3.[1] Defendant was sentenced to five years' imprisonment on Count 1 and five years' probation on Count 2. We reverse defendant's conviction and sentence under Count 1 because his conduct lies outside the scope of activity proscribed by 18 U. S. C. § 2113(b). We affirm his conviction on Count 2

1. There were actually two jury trials in this case. In the first, a jury found defendant guilty on all three counts charged. The trial judge, however, set aside that verdict and granted a new trial because the jury had considered extraneous material.

and remand with respect to the sentence on that count as indicated in part III below.

I. FACTS

Defendant Pinto was the president of Pinto Trucking Service, Inc. ("PTS"). On June 5, 1974, Nissin Unyu Soko ("Nissin"), a Japanese customer of PTS, instructed its bank in Japan, the Sanwa Bank Limited ("Sanwa Bank"), to remit $193.51 to PTS to satisfy a business debt.[2] Sanwa Bank did so by sending a telex communication to its correspondent bank in the area, Philadelphia National Bank ("PNB").

On June 6, 1974, PNB received the telex from the Sanwa Bank. In processing it, however, PNB mistakenly interpreted the telex to be a transmission of $193,511. Unaware of its mistake, PNB notified PTS and asked that firm how it wished to have the $193,511. handled. PTS, through its comptroller, requested that PNB deposit the funds in the PTS account at First Pennsylvania Banking and Trust Company ("First Pennsylvania"). PNB did so.

Subsequently, Pinto,[3] as president of PTS, drew checks on the corporation's account to pay its creditors. By the end of July 1974, the account, including the $193,511. deposit, was completely exhausted.

Meanwhile, PNB had not yet discovered its error. On July 31, 1974, PNB received a form letter from the

2. This debt arose in connection with a single contractual agreement between Nissin and PTS, effective from 1971 through 1974. This agreement resulted in approximately $15,000. of business and was the only contract between the two corporations.

3. It was undisputed that defendant had full control of the day-to-day operations of PTS and made all of the major decisions for the corporation. Thus, the propriety of holding him responsible for drawing checks on the $193,511. and for representing to PNB that PTS had invoices entitling it to the money (see below) was never questioned.

Sanwa Bank stating that Sanwa did not recognize the $193,511. charge. PNB responded routinely and provided the Sanwa Bank with the data necessary to trace the transaction.

On September 23, 1974, PNB received an "urgent" letter from the Sanwa Bank stating that the June 6, 1974, transmittal for the PTS account was $193.51, not $193,511. PNB reviewed the cable, finally realized its mistake, immediately called PTS to inform it of the error, and demanded repayment of the difference. The comptroller at PTS responded that he would investigate the matter and report back as soon as possible.

On September 27, 1974, an independent auditor at PTS called PNB. He reported that defendant Pinto had assured him PTS had invoices for the $193,511. and that PTS was entitled to the money. PNB again verified the telex mistake with the Sanwa Bank, sent copies of the verification to the attorney for PTS, and demanded repayment. On October 2, 1974, the PTS attorney responded, stating that PTS still believed it was entitled to the money.

By mid-October 1974, PTS acknowledged that the remittance was a mistake and commenced negotiations with PNB to repay the money. The negotiations proved fruitful and PTS reimbursed the bank for the overpayment by the end of 1978.

II. DISCUSSION

A. *Count 1*

Count 1 charges that:

> (A) in accordance with instructions of Nissin, Sanwa Bank transmitted, by wire and radio communication, on or about June 6, 1974, to PNB $193.51 for ultimate payment to PTS, but an employee of

PNB misinterpreted the communication and caused $193,511. to be transferred from the Sanwa Bank's account at PNB to the First Pennsylvania account of PTS;

(B) defendant knew of this transfer to the PTS account on or about June 6, 1974, and that none of the books and records of PTS showed that $193,511., as opposed to $193.51, was owed to PTS from Nissin; and

(C) in or about June and July 1974, defendant caused approximately $193,511. to be withdrawn from the PTS account at First Pennsylvania with intent to steal and purloin money of value exceeding $100. belonging to PNB, the deposits of which were insured by the Federal Deposit Insurance Corporation ("FDIC"), the money being in the care, custody, and control of First Pennsylvania, the deposits of which were insured by the FDIC.

As noted above, the prosecution submitted evidence from which the jury was justified in finding that the language of the above charges had been proved beyond a reasonable doubt. After careful consideration, we have concluded that this proof and these charges in Count 1 do not constitute a violation of 18 U. S. C. § 2113(b), which provides that

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank . . . shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . ."

The words of 18 U. S. C. § 2113(b) quoted above, the title of the Act which inserted this language in the

Bank Robbery Statute in 1937,[4] and the legislative history of the 1937 amending act[5] support a construction of this statute that does not include the transfer to the defendant's corporation of bank funds as a result of a unilateral mistake of the bank, or the payment of such funds either to defendant or to creditors of his corporation. The actions of defendant were fraud-type offenses not contemplated by the above quoted language. *See United States v. Rogers*, 289 F. 2d 433, 437-38 (4th Cir. 1961). In this case, there was no "taking away" of funds from either bank in a trespassory way. *See also LeMasters v. United States*, 378 F. 2d 262, 264 (9th Cir. 1967).

The Supreme Court has stated, in discussing other language of 18 U. S. C. § 2113, that, since the double jeopardy provision of the Fifth Amendment does not bar federal prosecution under this criminal statute "though a state conviction based on the same acts has already been obtained. . . . , additional weight [is given] to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute." *Jerome v. United States*, 318 U. S. 101, 105 (1943).

Also, it is noted that 18 U. S. C. § 2113 has been included by Congress in Chapter 103, entitled ROBBERY AND BURGLARY, of Part I of Title 18 covering crimes, whereas 18 U. S. C. § 1014, the basis for Count 2 of the indictment, is included in Chapter 47 of such Part I, entitled FRAUD AND FALSE STATEMENTS, which title

4. "To amend the bank-robbery statute to include burglary and larceny," 50 Stat. 749.

5. *See* House Report No. 732, 75th Cong. 1st Sess., and Senate Report No. 1259, 75th Cong. 1st Sess. *See also* 81 Cong. Rec. 4656 and 5376.

most aptly describes the gravamen of the offense with which the defendant is charged.[6]

The Supreme Court has consistently resolved any ambiguity in 18 U. S. C. § 2113 "in favor of lenity when required to determine the intent of Congress in punishing multiple aspects of the same criminal act." *Heflin v. United States*, 358 U. S. 415, 419 (1959), citing *Prince v. United States*, 352 U. S. 322 (1957).[7]

We do not believe that the decision in *United States v. Patton*, 120 F. 2d 73 (3d Cir. 1941), relied on by the prosecutor, is controlling on the facts now before the court. The issue there involved the language now in 18 U. S. C. § 2113(a), as opposed to the wording now in 18 U. S. C. § 2113(b) under which Count 1 of the indictment now before this court was filed.[8] Similarly, *United States v.*

6. In this connection, we note that the National Motor Vehicle Theft Act, 18 U. S. C. § 2312, is not included in Chapter 103 but is included in Chapter 113 of Part I of Title 18, which Chapter is entitled STOLEN PROPERTY. *Cf. United States v. Turley*, 352 U. S. 407 (1957).

7. In *Prince, supra* at page 329, the Court used this language in commenting on permissible sentences under 18 U. S. C. § 2113:

> "While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

8. In *Patton*, the court used this language at page 74-75 of 120 F. 2d:

> "The government states that the question involved on this appeal is whether under the facts above stated the defendant was guilty of entering a national bank with intent to commit larceny therein. It seems to be conceded that to take and carry away from a bank property belonging to it with intent to steal and purloin the same, as charged in the third count, is the equivalent of committing larceny in the bank. We shall ac-

Bryan, 483 F. 2d 88 (3d Cir. 1973), involved a different section of the criminal code (18 U. S. C. § 659), and we do not believe the wording in footnote 1 of that opinion (483 F. 2d at 91), relied on by defendant, is binding on this court in this case.[9]

We note that the decisions of courts of appeals for other circuits relied on by the prosecution are factually quite different in that the bank funds taken and carried away were drawn out of a bank through various fraudulent schemes, such as (1) the use of stolen checks deposited in bank accounts of the thief's wife and under an assumed name used by the thief (*United States v. Giuffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U. S. 833 (1978)), (2) the sale of bearer bonds, stolen from a bank vault, at discount prices to investigators working for that bank (*United States v. Fistel*, 460 F. 2d 157 (2d Cir. 1972)), and (3) drawing money in cash from the thief's bank account when he knew the bank had mistakenly inflated the amount in that account (*Thaggard v. United States*, 354 F. 2d 735 (5th Cir. 1965), *cert. denied*,

8. (Cont'd.)

cordingly limit our consideration to the question stated by the government. . . .

" 'Larceny, at common law, is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein.' Clark's Cr. Law (3rd Ed.) 305. One of the essential elements of the crime is that the taking is by trespass, that is, without the consent of the owner. . . .

• • •

"That the defendant in the present case did not take the money from the bank teller against his will is undisputed."

9. The language describing 18 U. S. C. § 2113(b) was not decisive in the *Bryan* case but was merely used as a basis for comparison with 18 U. S. C. § 659.

383 U. S. 958 (1966)). In none of these cases was a credit (a) made to an established account due to the unilateral mistake of another bank, and (b) utilized fraudulently by the defendant through drawing on such account to both the account owner's creditors and the defendant.

For the above reasons, we decide that defendant's dissipation of funds credited to his bank account wholly because of another bank's unilateral error is not conduct punishable under 18 U. S. C. § 2113(b) under the circumstances presented by this record. Defendant's conviction on Count 1, therefore, will be reversed.[10]

B. *Count 2*

Count 2 charges, *inter alia:*

> "2. . . . Bob Pinto, did knowingly make and cause to be made, materially false statements for the purpose of influencing the actions of PNB upon the advance of the $193,511 to the Pinto account at First Pennsylvania by deferment of action and otherwise.
>
> "3. The materially false statements referred to in paragraph 2 of this Count of the Indictment are more fully described as follows:
>
> "a. BIAGIO PINTO, a/k/a Bob Pinto, did cause PNB to be informed that Nissin did owe $193,511 to PTS when in truth and in fact as he then well knew, Nissin did not owe PTS $193,511; and
>
> b. BIAGIO PINTO, a/k/a Bob Pinto, did cause representations to be made to PNB that

10. Because we reverse defendant's conviction under Count 1, we need not address two of his remaining arguments: that the district court erroneously excluded certain evidence and that it improperly instructed the jury on the law applicable to Count 1.

> there were genuine documents, records, and invoices showing that Nissin did owe $193,511 to PTS when in truth and in fact as he then well knew there were no genuine documents, records, and invoices showing that Nissin did owe $193,511 to PTS.
>
> "In violation of Title 18, United States Code, Section 1014 and Section 2(b)." [11]

The pertinent language of 18 U. S. C. § 1014 provides:

> "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any . . . advance . . ., by . . . deferment of action or otherwise, . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both."

PNB is a bank insured by the FIDC.

Defendant does not dispute that he made "false statements" to PNB when he, through his attorney, stated that PTS was entitled to the $193,511.[12] Rather, defendant argues the $193,511. does not constitute an "advance" within the meaning of 18 U. S. C. § 1014. We disagree.

The term "advance" has not been specifically defined in any case law cited to this court.[13] Defendant contends

11. Appellant's Appendix 13A-14A.

12. The jury was entitled to find that Pinto's purpose in providing such false information was to persuade PNB to defer taking action to recover the money which PNB had advanced to the PTS account at First Pennsylvania.

13. *Black's Law Dictionary* 48 (5th ed. 1979) includes in the many common meanings given to "advance": "furnishing money or goods for others in expectation of reimbursement." Other courts

that "advance" should be construed as referring only to funds extended as a loan in a credit transaction. Cases involving false representations made on loan applications constitute the bulk of convictions under 18 U. S. C. § 1014. *See United States v. Scalzitti*, 578 F.2d 507 (3d Cir. 1978).

"Advance," as used in 18 U. S. C. § 1014, should not be so narrowly construed as to apply solely to funds extended in a loan situation. The statute refers to both "advance" and "loan." If "advance" was only to refer to a loan, the term "advance" would be rendered meaningless.

Furthermore, the statute was intended to maintain the vitality of the FDIC insurance program, *United States v. Bush*, 599 F. 2d 72, 75 (5th Cir. 1979), and "to cover all undertakings which might subject the FDIC insured bank to risk of loss." *United States v. Stoddart*, 574 F.2d 1050, 1053 (10th Cir. 1978). *In United States v. Payne*, 602 F. 2d 1215 (5th Cir. 1979), the Fifth Circuit Court of Appeals interpreted 18 U. S. C. § 1014 as prohibiting "check kiting," a practice not specifically proscribed in the statute and, as in the present case, not involving a credit transaction.[14]

We hold that defendant's conduct violated 18 U. S. C. § 1014. Substantial evidence supports the jury's deter-

13. (Cont'd.)

have affirmed convictions based on oral statements and rejected defendant's suggestion that only written applications for loans or other writings can violate § 1014. United States v. Sackett, 598 F. 2d 739 (2d Cir. 1979); United States v. Stoddart, 574 F. 2d 1050 (10th Cir. 1978).

14. Two district courts in the Third Circuit have determined that "check kiting" is not punishable under 18 U. S. C. § 1014. *United States v. Sher*, 505 F. Supp. 858, 861-62 (W. D. Pa. Jan. 9, 1981), *appeal docketed*, No. 81-1317 (3d Cir. Feb. 27, 1981); United States v. Edwards, 455 F. Supp. 1354 (M. D. Pa. 1978). We specifically do not address that issue here.

mination that defendant made false representations with the intent to influence PNB, a federally insured bank, in its action on the $193,511. deposit. The mistaken deposit into defendant's account constitutes an "advance" under the terms of 18 U. S. C. § 1014. Defendant's conviction on Count 2 will be affirmed.

III. CONCLUSION

Defendant's conviction and sentence on Count 1 will be reversed. His conviction on Count 2 will be affirmed and the case will be remanded as to the sentence on Count 2 so that the prosecution may apply to the district court for resentencing on that count, in light of the reversal of the conviction and sentence on Count 1. *See United States v. Busic*, — F. 2d — (Nos. 77-1375, 77-1376, 3d Cir. Jan. 20, 1981).

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2420

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a Bob Pinto,
Appellant

(D. C. Criminal No. 79-00133)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS and VAN DUSEN, *Circuit Judges* and ACKERMAN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 23, 1981.

* Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 8, 1980, be, and the same is hereby reversed with respect to the judgment on Count I, affirmed with respect to the judgment on Count II, and the cause remanded to the said district court so that the prosecution may apply to the district court for resentencing with respect to Count II, in light of the reversal of the conviction and sentence on Count I, all in accordance with the opinion of this Court.

ATTEST:

SALLY MRVOS

Clerk

April 16, 1981

APPENDIX C

Order Denying Appellant's Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2420

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a Bob Pinto,
Appellant

(D. C. Criminal No. 79-00133)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Van Dusen, Senior Judge was a member of original panel.

By THE COURT,

JOHN J. GIBBONS

Judge

Dated: May 8, 1981

APPENDIX D

Order Denying Appellee's Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2420

UNITED STATES OF AMERICA

v.

PINTO, BIAGIO a/k/a Bob Pinto,
Appellant

(D. C. Crim. No. 79-00133)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH,
HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Adams votes for rehearing. He believes that the result reached by the opinion represents a crabbed and unrealistic interpretation of § 18 U. S. C. 2113(b), and is also at variance with the interpretation set forth by the Second, Fourth, Fifth and Eighth Circuits. The panel here specifically determined that the defendant did, in fact, take the excess money with the intent to steal or purloin it, but then proceeded to conclude that a "fraud type" stealing or purloining is not encompassed by § 2113(b). Nothing in the legislative history of the statute demonstrates that Congress sought to exclude "fraud type" stealing.

The petition for rehearing suggests that in 1979 the Federal Reserve System alone handled approximately 35,000,000 interbank transactions. 66th Annual Report, Board of Governors of the Federal Reserve System, 300, 323 Table 9. Undoubtedly, the overwhelming majority of these transactions were processed without error. But, as the present case illustrates, errors sometimes occur. The interpretation reached by the panel would exclude from coverage of § 2113(b) an individual's knowing exploitation of errors arising in connection with interbank transfers, to the detriment of the banking system and the public generally.

Judge Garth also votes for rehearing and joins Judge Adams' statement.

By THE COURT,

JOHN J. GIBBONS,

Judge

Dated: June 10, 1981

Office-Supreme Court, U.S.
FILED
AUG 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2110

In the Supreme Court of the United States

OCTOBER TERM, 1980

BIAGIO PINTO, a/k/a BOB PINTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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D. LOWELL JENSEN
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QUESTIONS PRESENTED

1. Whether the court of appeals properly remanded petitioner's case for resentencing on the surviving count of a multi-count indictment after it reversed his conviction on another count.

2. Whether petitioner's false statements to a federally insured bank were made in connection with an "advance" within the meaning of 18 U.S.C. 1014.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2110

BIAGIO PINTO, a/k/a BOB PINTO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 646 F. 2d 833.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1981, and a petition for rehearing was denied on May 8, 1981. The petition for a writ of certiorari was filed on June 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of bank larceny, in violation of 18 U.S.C. 2113(b) (Count One), and on one count of making false statements to a federally insured bank, in violation of

18 U.S.C. 1014 (Count Two).[1] He was sentenced to five years' imprisonment on Count One and five years' probation on Count Two (Pet. App. A2). The court of appeals reversed the conviction on Count One, finding that petitioner's conduct lay outside the scope of activity proscribed by 18 U.S.C. 2113(b) (Pet. App. A4-A9). The court affirmed the conviction on Count Two and remanded the case with respect to the sentence on that count (Pet. App. A9-A12).

The trial evidence showed that petitioner was president of Pinto Trucking Service, Inc. (Trucking). Between 1972 and 1974, Trucking conducted business with a Japanese company, Nissin Unyu Soko (Nissin), totaling about $15,000 for the entire period (App. 47A-51A, 177A-178A, 323A).[2]

On June 5, 1974, Nissin instructed its bank in Japan, the Sanwa Bank Limited, to remit $193.51 to Trucking. Sanwa Bank did so by sending a telex communication to its American correspondent bank in the area, Philadelphia National Bank (PNB) (App. 116A-118A; Supp. App. 37A). In processing the telex from Sanwa Bank, however, PNB mistakenly interpreted the telex as a transmission of $193,511. Accordingly, $193,511 was charged to Sanwa Bank's account at PNB, and PNB contacted Trucking to determine how the money was to be handled (App. 58A-60A; Supp. App. 18A). Trucking, through its comptroller, instructed PNB to deposit the funds in Trucking's account at First Pennsylvania Banking and Trust Company, which PNB did (App. 60A-61A).

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[1]Petitioner was acquitted on a third count, which charged fraud under 18 U.S.C. 1343. This was petitioner's second trial; the trial judge set aside the verdict in the first trial, in which petitioner had been found guilty on all three counts, because the jury had considered extraneous material (Pet. App. A2 n.1).

[2]"App." refers to the Appendix filed in the court of appeals and "Supp. App." to the Supplemental Appendix in that court.

Because Trucking's comptroller was unable to document such a large receivable, he asked petitioner about it. Petitioner said the funds belonged to him, and he told the comptroller to put the money into an account comprising funds either due to petitioner from the company or due from petitioner to the company (App. 191A-192A, 196A-197A). Thereafter, petitioner directed that funds from that account be used to pay Trucking's creditors. Within 30 days, the entire $193,511 had been dissipated (App. 200A-201A).

By late September 1974, after some routine communications between PNB and Sanwa Bank concerning the discrepancies in their records, the original error was discovered. PNB immediately notified Trucking and demanded repayment of the difference (App. 74A-80A; Supp. App. 20A, 22A). On September 27, 1974, an independent auditor for Trucking called PNB to report that petitioner had assured him that Trucking had invoices for the $193,511 and that Trucking was entitled to the money (App. 81A-82A, 370A-372A). PNB again verified the telex mistake with Sanwa Bank, sent copies of the verification to Trucking's attorney, and again demanded repayment. Trucking's attorney nevertheless responded that Trucking still believed that it was entitled to the funds (App. 84A-88A; Supp. App. 27A). At a meeting with a loan officer from First Pennsylvania on October 2, 1974, petitioner again insisted that the Japanese firm owed Trucking the entire $193,511 (App. 152A-159A; Supp. App. 145A).

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals had no authority to vacate the sentence imposed under 18 U.S.C. 1014 and remand for resentencing in light of the reversal of his conviction on another count. He also claims (Pet. 10-11) that the decision below conflicts with a long line of decisions holding that a legal sentence on a

surviving count may not be changed after convictions on other counts have been reversed on appeal, without violating the Double Jeopardy Clause of the Fifth Amendment.

a. Petitioner's claim is not presently ripe for review by this Court because the district court has not yet determined whether he should be resentenced. The district court is not obligated to resentence petitioner to a different sentence on the Section 1014 count; the court of appeals held only that "the prosecution may apply to the district court for resentencing on [Count Two]" (Pet. App. A12). If the district court leaves the Section 1014 sentence unchanged, petitioner's claim will be moot. In these circumstances, this Court's review of the instant petition would be premature.

b. Furthermore, in view of recent developments in the area of double jeopardy law, we believe that the Court should not now undertake to consider this issue. Petitioner claims that the Third Circuit, both here and in *United States* v. *Busic*, 639 F. 2d 940 (1981), cert. denied, No. 80-6379 (June 8, 1981), has departed from the previously unanimous view of the courts of appeals that vacation and remand of a legal sentence would violate the Double Jeopardy Clause (Pet. 10-11). Yet all of the cases upon which petitioner relies were decided before this Court's recent decision in *United States* v. *DiFrancesco*, No. 79-567 (Dec. 9, 1980), which strongly supports the constitutionality of the resentencing that the court of appeals has authorized here.

In *DiFrancesco*, the Court rejected a double jeopardy attack upon a statute which authorized the government, in certain circumstances, to seek appellate review of a sentence on the ground that it should have been more severe. See 18 U.S.C. 3576. The Court held that "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase" (slip op. 20). Nor does a defendant have the "right to know at *any* specific

moment in time what the exact limit of his punishment will turn out to be" (*id.* at 19, emphasis supplied) (see Pet. 16-17). It was in light of the Court's decision in *DiFrancesco* that the Third Circuit in *Busic* re-examined its previous position and concluded that the Double Jeopardy Clause does not prohibit resentencing on surviving counts of a multi-count conviction "when the sentence has been spread erroneously over counts that have been declared invalid" (639 F. 2d at 947-948). As the Third Circuit explained, when a trial court's sentencing plan is based on an aggregate conviction, reversal of one or more counts may thwart the entire structure of the interdependent sentence, and a complete resentencing may therefore "reduce the possibility of disparate and irrational sentencing" (*id.* at 948).

Contrary to petitioner's assertion (Pet. 11), a petition for a writ of certiorari was filed in *Busic* (No. 80-6379), and certiorari was denied on June 8, 1981.[3] The Second Circuit has also changed its position on this issue on the authority of *DiFrancesco*, and this Court denied certiorari in that case as well. *McClain* v. *United States*, 643 F. 2d 911, 913 (1981), cert. denied, No. 80-6536 (June 8, 1981). These developments suggest that the other courts of appeals may also reconsider their previous holdings as this issue again comes before them.[4]

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[3]Furthermore, we are advised by the United States Attorney for the Western District of Pennsylvania that in fact the district court in *Busic* declined the opportunity given by the court of appeals to increase the defendants' sentences on the surviving counts, thus rendering moot the issue sought to be presented interlocutorily to this Court in that case. As we have noted, the same outcome is possible here, and that possibility alone dictates denial of the present petition.

[4]In fact, in several cases that were decided before *DiFrancesco* the courts of appeals have remanded for resentencing in similar circumstances. *United States* v. *Hodges*, 628 F. 2d 350, 352-353 (5th Cir. 1980); *Johnson* v. *United States*, 619 F. 2d 366, 368-369 (5th Cir. 1980); *United States* v. *Moore*, 540 F. 2d 1088, 1091 (D.C. Cir. 1976); *Kitt* v.

Moreover, the contrary decisions of the courts of appeals upon which petitioner relies (Pet. 10-11) are premised upon the courts' interpretations of *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), and *United States* v. *Benz*, 282 U.S. 304 (1931). In *DiFrancesco* (slip op. 20-22), this Court clarified the meaning of those cases, noting that they "are not susceptible of general application" and confining them "to *Lange*'s specific context," where the defendant received a greater sentence than the legislature had authorized.

Petitioner would distinguish (Pet. 16) *DiFrancesco* on the ground that there, unlike here, a statute explicitly authorized appellate review of the sentence. Thus, petitioner argues (Pet. 12-13) that there was no legal authority for the court of appeals' action here. Although the Third Circuit did not cite any specific statutory authority in remanding for resentencing on Count Two, there is ample authority for this action in 28 U.S.C. 2106, which grants general supervisory powers to the federal appellate courts in connection with their disposition of appeals. See *McClain* v. *United States*, *supra*, 643 F. 2d at 914.[5]

Thus, the court of appeals had authority to remand for resentencing, and there is not at present any conflict among the circuits that warrants immediate resolution by this Court. Although review may be necessary in the future, we

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United States, 138 F. 2d 842, 843 (4th Cir. 1943); *Phillips* v. *Biddle*, 15 F. 2d 40, 41 (8th Cir. 1926). Thus, the contrary authority upon which petitioner relies (Pet. 10-11) was not as well settled as he claims.

[5]Petitioner's further point (Pet. 13) that the court of appeals did not actually vacate the sentence, and that the district court has no such authority, is also unpersuasive. The court of appeals was explicit in its order that the purpose for the remand was "so that the prosecution may apply to the district court for resentencing with respect to Count II" (Pet. App. A14). Thus, the court of appeals obviously authorized further action by the district court, as it may do under 28 U.S.C. 2106.

believe that the interests of justice and judicial economy will be advanced if such review awaits further developments in the lower courts.[6]

2. Petitioner also contends (Pet. 18-21) that the transmission of funds to Trucking's First Pennsylvania Bank account was not an "advance" within the meaning of 18 U.S.C. 1014. Petitioner claims that this statute was intended to apply only to transactions involving consensual extensions of credit by federal agencies or by institutions insured by federal agencies. This argument is without merit.

As the court of appeals observed, the term "advance" in 18 U.S.C. 1014 has nowhere been specifically defined. However, the statute's use of the term "advance" in addition to the word "loan" implies that the former has some additional meaning beyond that of "loan" (Pet. App. A11). When enacting Section 1014, Congress intended that the language used in the statute would be given its common and accepted meaning. *United States* v. *Stoddart*, 574 F. 2d 1050, 1053 (10th Cir. 1978). Among the many common meanings attributed to the word "advance" is that of "furnishing money or goods for others in expectation of reimbursement." *Black's Law Dictionary* 48 (5th ed. 1979). Here, PNB furnished money to Trucking's account at First Pennsylvania, for Sanwa Bank, in expectation of reimbursement by Sanwa Bank. Indeed, before PNB deposited the

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[6]Petitioner also attempts (Pet. 14-15) to distinguish this case from *United States* v. *Busic*, *supra*, by arguing that he was convicted of two separate and independent offenses, whereas the issue arose in *Busic* in the context of a divided sentence for a single offense, an armed assault of federal officers. Any distinction between these two cases on that point is immaterial. While the false statement charge in this case may technically rest on an act separate from the initial fraudulent conversion of the funds, the entire prosecution here was based on essentially one course of conduct, which happened to violate more than one criminal statute.

money in First Pennsylvania Bank, it put a hold on Sanwa Bank's PNB account to obtain immediate reimbursement. When PNB eventually had to refund the excess money to Sanwa Bank, it still retained an expectation of reimbursement from Trucking.

Moreover, several decisions have interpreted the statute broadly as intended to include activities beyond those involved in traditional loan agreements. In holding that the statute included an oral statement in which a defendant falsely claimed that he had deposited sufficient funds in another branch of the bank to cover a check he had written, the Tenth Circuit determined in *United States* v. *Stoddart, supra*, 574 F. 2d at 1053, that "[t]he purpose of § 1014 was to cover all undertakings which might subject the FDIC insured bank to risk of loss." Likewise, in *United States* v. *Bush*, 599 F. 2d 72, 75 (5th Cir. 1979), the court held that Section 1014 extends to "all material false statements * * *, even when the false statements are given with the knowledge, consent or duplicity of a bank officer." The Third Circuit's holding on this issue was correct and it does not conflict with any other appellate court decision construing 18 U.S.C. 1014 or otherwise warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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No. 80-2110

IN THE

Supreme Court of the United States

October Term, 1980

BIAGIO PINTO, a/k/a BOB PINTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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No. 80-2110

IN THE

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OCTOBER TERM, 1980

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

Factual misstatements and legal distortions in the Brief for the United States in Opposition necessitate this brief Reply.

1. The Government attempts to confuse this case with two cases involving illegal sentences in which this Court recently denied certiorari. *McClain v. United States,* 643 F. 2d 911 (2d Cir.), *cert. denied,* No. 80-6536 (June 8, 1981); *United States v. Busic,* 639 F. 2d 940 (3d Cir.), *cert. denied,* No. 80-6379 (June 8, 1981). In *McClain* and *Busic,* the trial courts had imposed consecutive prison terms on multiple counts; these sentences were illegal because the indictment in each case charged a single offense for which there could be only one lawful punishment.

When a single offense has been improperly fragmented into multiple counts and an aggregate prison sentence has been imposed by cumulating consecutive terms on the separate counts, none of the component sentences necessarily survives a determination that the separate counts merge into a single offense.[1]

The present case does not involve a single offense, and the sentences imposed on each of the two convictions were entirely legal. The two crimes do not merge. Neither is a provision for enhanced punishment for an aggravated form of a basic offense. The statutes involved are wholly unrelated sections of the federal criminal code. If petitioner had received consecutive prison sentences on the two counts, there would have been no basis to challenge the aggregate sentence as a matter of law.

It is a gross disservice to this Court for the Government to assert that the distinction between this case and the illegal sentence cases is immaterial. In the relative obscurity of a footnote, the Government states:

> "While the false statement charge in this case may technically rest on an act separate from the initial fraudulent conversion of the funds, the entire prosecution here was based on essentially one course of conduct, which happened to violate more than one criminal statute." (Brief in Opposition, p. 7, n. 6).

1. Other decisions relied on by the Government are all in the same category. Two are bank robbery prosecutions in which the multiple counts were held to have merged. *United States v. Hodges,* 628 F. 2d 350 (5th Cir. 1980); *Johnson v. United States,* 619 F. 2d 366 (5th Cir. 1980). *United States v. Moore,* 540 F. 2d 1088 (D. C. Cir. 1976), was a 22-count conviction for dispensation of methadone; the multiplicity of counts was based upon evidence of 22 distributees. When the court of appeals concluded that the indictment was insufficient as to eight counts, it remanded for resentencing on the remainder. In *Kitt v. United States,* 138 F. 2d 842 (4th Cir. 1943), the sentencing court imposed twice the legal maximum term on each of four of the five counts.

The Government's argument-by-adverb—"technically," "essentially"—is remarkable. What the Government seeks to dismiss as a mere technicality, the difference between a sentence set aside because it is illegal and a lawful sentence, goes to the essence of the fundamental question presented to this Court.

2. The Government's argument that 28 U. S. C. § 2106, on a defendant's appeal from conviction, authorizes appellate review of a lawful sentence as too lenient is as audacious as it is wrong. Congress has authorized prosecution appeal from sentence in only one narrow situation under the Organized Crime Control Act of 1970; this Court upheld that provision in *United States v. DiFrancesco*, — U. S. —, 101 Sup. Ct. 426 (1980). If a district court imposes a sentence below the limits authorized by statute, the government may seek relief from a court of appeals by writ of mandamus. See *United States v. Denson*, 603 F. 2d 1143 (5th Cir. 1979). Otherwise, it is an established principle that federal courts of appeals lack the power to review sentences, whether at the instance of the defendant or the prosecution. The Government now claims that sleeping within § 2106 there has been a pervasive power of federal appellate courts to set aside lawful sentences.

While the Government makes this argument in a case involving a conviction on multiple counts, there is nothing in the argument that confines it to that setting. If a court of appeals can upset one of two lawful sentences under § 2106, the power asserted is applicable to any lawful sentence.

The Third Circuit, presumably well aware of § 2106, did not rest its order on this section. The Court of Appeals based its order entirely on *United States v. Busic, supra*, without recognizing that *Busic* involved the problem of a single offense having been fragmented illegally into multiple counts.[2] The § 2106 argument is a belated idea raised by the Government for the first time in this Court.

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2. Contrary to the assertion of the Government (Brief in Opposition pp. 3, 6 n. 5), the Court of Appeals did not vacate the lawful

3. The Government joins with the Third Circuit in construing this Court's decision in *DiFrancesco* as a revolutionary shift in the law of double jeopardy. Petitioner maintains, as set forth in his petition, that *DiFrancesco* upheld a narrowly drawn statute that authorized government appeal from sentence in one specific offense. The Government does not argue that the prosecution could have taken an appeal from the sentence imposed on petitioner under the § 1014 count. Rather the Government believes that it can have a backhanded appeal on sentence when a defendant has appealed on the merits of a conviction. Punishing an appellant for taking an appeal raises the most serious question under the Double Jeopardy Clause. Nothing that *DiFrancesco* held or implied supports a conclusion that the Constitution is satisfied when this occurs.

The Third Circuit stands alone in its heretical view of the Double Jeopardy Clause. The Government asserts that the Second Circuit has also changed its position. In the case cited by the Government, the Second Circuit explicitly *refused* to change its position.[3] *McClain v. United States, supra,* at 913. Moreover, as we have previously noted, *McClain* is one of the recent cases in which a single bank robbery offense was fragmented into multiple counts on which the trial court had imposed consecutive prison terms. No other court of appeals has agreed with the Third Circuit's interpretation of the Double Jeopardy Clause. Every other court of appeals that has decided the

2. (Cont'd.)

sentence imposed on the conviction under 18 U. S. C. § 1014. The limited Third Circuit order may indicate that the Court of Appeals sensed a difference between this case and *Busic*.

3. The Second Circuit took note of the argument that *DiFrancesco* "sheds new light" on the rules for finality of sentences under the Double Jeopardy Clause and may have made prior decisions "less authoritative precedents than they theretofore had been," but the Court of Appeals said: "We need not, however, concern ourselves with that question at the present time." 643 F. 2d at 913.

question has disagreed with the Third Circuit. The present conflict among the circuits is patent.

4. The interests of justice and judicial economy, cited by the Government as reasons for this Court to delay decision, point exactly in the opposite direction. Nothing will be served, except confusion and mismanagement of scarce judicial resources, by waiting for further developments in the lower courts. The issue, clearly drawn, is essentially a question of law. Further litigation in other factual settings is neither required nor useful to prepare for a principled resolution of this significant constitutional question by this Court.

Delay, on the other hand, will be extremely harmful in terms of judicial economy. Criminal cases move through the courts of appeals in very large numbers. On a matter so fundamental as the power of an appellate court to review a lawful sentence, the potential impact is enormous. A delayed decision, made at some future time, will affect not only cases then moving through the system of justice, but will give rise to potential postconviction litigation by a great many others adversely affected. The factor of judicial economy supports the petition for the earliest consideration and authoritative resolution of this issue.

An even more compelling argument for immediate action by this Court is raised by concern for the interests of justice. With the chill caused by the Third Circuit decision, defendants and their counsel will not know how to proceed with regard to appeals. Undoubtedly, petitioner would not have taken an appeal on the merits of the conviction under § 1014 if he had known—or even suspected—that the Third Circuit would hold it had the power to affirm on the merits and, further, to upset the sentence. In football vernacular, petitioner was "blindsided." What occurred to petitioner in this case undermines the right to appeal. If, as petitioner contends, that chill is caused by the Third Circuit's misinterpretation of the Fifth Amendment, serious and deep injury will be done to the interests of justice. Even if petitioner is wrong,

litigants are entitled to know the limits on double jeopardy protection. The question should not be left dangling in uncertainty.

5. What has just been said largely disposes of the Government's argument that this case is not yet ripe for review. If the Government had wished, it could have informed this Court that it would not accept the Third Circuit's invitation to move to have petitioner's sentence increased. The Government's silence indicates what is almost foregone, that every effort will be made to use the opening created by the Court of Appeals. The attitude of the District Court is also revealed. Even before the Third Circuit could issue its mandate, the District Court ordered the parties to appear for resentencing. Only the timely petition for certiorari compelled the court to cancel its scheduled hearing. The orders are attached hereto as Appendix A, *infra*. Given the exigencies, it is much less than candid for the Government to assert that the issue is not ripe for decision.

6. The Government insists upon its Alice-in-Wonderland reading of 18 U. S. C. § 1014. Unable to avoid petitioner's argument that an "advance" under that section is a consensual transaction for the furnishing of money in expectation of reimbursement, the Government blithely asserts that § 1014 means: If *A* receives funds from a bank, which has no expectation of reimbursement from *A*, but which does expect reimbursement from anyone else, the bank has made an "advance" to *A*. Only Lewis Carroll would be proud of such a feat of logic. Moreover, the Government's illogic, unembarrassed by the fact that the case was not tried on any such theory, fails to fit the facts. The bank in this case expected reimbursement from no one, since it immediately charged the existing account of the Japanese bank with the amount transferred.

The United States Brief in Opposition contains no valid arguments against the timeliness of review by this Court. The Government does not contend that the issue

is not sufficiently important to merit consideration. Petitioner submits that the writ of certiorari should be issued.

Respectfully submitted,

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Philadelphia, PA 19107
Counsel for Petitioner

August 1981

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATE NOTICE MAILED 4-22-81

(4-30-81)
CANCELLED

CRIMINAL NO. 79-133

UNITED STATES OF AMERICA

v.

BIAGO PINTO

TAKE NOTICE that the above entitled case has set for RE-SENTENCING in Courtroom 12-A, United States District Court, 6th & Market St., Phila., Pa. 19106, on MONDAY, MAY 18, 1981, at 9:30 AM, before the Honorable Daniel H. Huyett, 3rd.

All defendants are directed to report to the courtroom on the date and time indicated above. If a defendant fails to appear as directed, the bail may be forfeited and a bench warrant issued.

If a defendant is presently in jail, the defendant or his counsel shall notify the undersigned in writing immediately so that the necessary procedures can be taken to have the defendant present in court.

Very truly yours,

FRANCIS E. DEVINE
Francis E. DeVine, Deputy Clerk
12614 U. S. Courthouse
Phila., Pa. 19106
Telephone: 215-597-9647